

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL RODRIGUEZ,

Defendant and Appellant.

B231579

(Los Angeles County
Super. Ct. No. LA062256-01)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael K. Kellogg, Judge. Affirmed in part, reversed in part, and remanded with directions.

Marcia C. Levine, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Kim Aarons, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of part A of the Discussion.

Appellant Michael Rodriguez challenges his convictions for kidnapping during a carjacking, robbery, and several sexual offenses. He maintains that the prosecution engaged in misconduct and that the trial court erred in imposing sentence. In the unpublished portion of this opinion, we hold that appellant has failed to establish prosecutorial misconduct. In the published portion of the opinion, we conclude that the trial court erred in sentencing appellant under former subdivision (g) of the One Strike law (Pen. Code, § 667.61), which limited the imposition of One Strike terms on multiple sex offenses committed on a single occasion.¹ As we explain, because the Legislature amended the One Strike law to eliminate this provision prior to appellant's offenses, the trial court was obliged to impose a One Strike term on each of appellant's offenses eligible for sentencing under the One Strike law. In addition, the trial court erred by imposing a One Strike term as an enhancement, imposing additional punishment for facts needed to support sentencing under the One Strike law, and miscalculating appellant's sentence for an offense outside the scope of the One Strike law. We therefore affirm the convictions but reverse the judgment solely with respect to appellant's sentence, and remand for re-sentencing.

RELEVANT PROCEDURAL BACKGROUND

On November 4, 2010, an amended information was filed charging appellant with kidnapping during a carjacking (§ 209.5, subd. (a); count 1), robbery (§ 211; count 2), sexual penetration by a foreign object (§ 289, subd. (a)(1); counts 3, 6, and 8), forcible rape (§ 261, subd. (a)(2); counts 4 and 5), forcible oral copulation (§ 288a, subd. (c)(2); count 7), and attempted sodomy by use of force (§§ 286, subd. (c)(2), 664; count 11). Accompanying the charges -- excluding the count for

¹ All further statutory citations are to the Penal Code.

kidnapping during a carjacking -- were allegations that appellant personally used a knife (§ 12022, subd. (b)(2)). In addition, accompanying the charged sexual offenses (counts 3 through 8 and 11) were allegations that appellant was subject to sentencing under the One Strike law (§ 667.61, subds. (a), (e)). Appellant pleaded not guilty to all the counts and denied the special allegations.

A jury found appellant guilty as charged, and found the special allegations to be true. The trial court sentenced appellant to a term of 80 years to life, plus a consecutive term of life.

FACTUAL BACKGROUND

A. Prosecution Evidence

At approximately 8:30 p.m. on May 3, 2009, Jessica M. left the Shakey's restaurant at which she worked and drove to the Vallarta store near Sherman Way and Vineland, where she bought some food. After she reentered her parked car, appellant asked for a ride, stating that he had been "jumped [by] gang members." Jessica agreed to help appellant. As the pair drove toward Vineland and Victory, Jessica permitted appellant to use her cell phone because he said his cell phone was dead.

After making a phone call, appellant said to Jessica, "This is a kidnap," displayed a knife with a four- or five-inch blade, and ordered her to drive toward Newhall. As she did so, appellant took money from Jessica's purse. Upon finding only seven dollars in the purse, appellant demanded more money. When Jessica replied that she had none, appellant cut her hand with his knife.²

² In addition, while Jessica drove toward Newhall on a freeway, appellant told her that two accomplices were following them in a car. Later, the car appeared to follow Jessica as she exited the freeway for Newhall.

At appellant's direction, Jessica stopped in a deserted shopping center parking lot in Newhall. After she parked, he sexually assaulted and raped her, forced her to copulate him orally, and attempted to sodomize her. He then ordered her to leave the car. According to Jessica, as she retrieved her work shirt bearing the "Shakey's" logo, appellant laughed sarcastically and said, "Oh, you work there."

After Jessica left the car, appellant drove away, taking with him her money and cell phone. Jessica ran to a nearby restaurant and made a 911 call. Investigating officers took Jessica to a hospital, where she was examined by Sandra Wilkinson, a sexual assault nurse.

When Jessica failed to come home, her parents and sister Veronica became alarmed. Veronica repeatedly tried to phone Jessica, but contacted only Jessica's voice mail. At approximately 1:15 a.m., a man answered Jessica's cell phone, described himself as Jessica's boyfriend, and said that Jessica was asleep. When Veronica requested Jessica's location, the man laughed and replied that he was in Palmdale. After the call ended, Veronica and her mother learned from police officers that Jessica had been taken to a hospital.

On June 3, 2009, investigating officers found Jessica's car in Sun Valley, where it appeared to have been parked for a long period. Later, on June 5, 2009, Jessica saw appellant on a sidewalk as she drove in Sunland. Jessica contacted the police and watched him enter a library. Police officers soon arrived and arrested appellant.

While interviewing appellant, Los Angeles Police Department detectives told him that Jessica's cell phone had been used to place a call to appellant's own cell phone. Following this disclosure, appellant admitted that he had robbed

Jessica and taken her car while she was in it. He also admitted that he had touched her breasts, but denied raping her.³ Appellant's DNA matched DNA in evidence swabs Wilkinson had taken from Jessica's breasts.

B. Defense Evidence

Cari Caruso, a sexual assault examiner, testified that a copy of a photograph that Wilkinson had taken of Jessica's injuries showed no injuries or abnormalities. She also opined that one cannot determine whether sexual contact is consensual on the basis of the injuries to a participant.

C. Rebuttal

Marilyn Stotts, a sexual assault nurse, testified that in order to assess potential injuries from a sexual assault, it was preferable to conduct a physical examination of the victim, rather than to rely solely on photographs of the victim.

DISCUSSION

Appellant contends there was prosecutorial misconduct and sentencing error. We reject appellant's challenges, with the exception of certain contentions regarding his sentence.

A. Prosecutorial Misconduct

Appellant contends the prosecutor engaged in several instances of misconduct during trial. As explained below, we discern no misconduct supporting a reversal of the judgments.

Generally, “[a] prosecutor's . . . intemperate behavior violates the federal

³ An audio recording of the interview was played for the jury.

Constitution when it comprises a pattern of conduct ‘so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.’”

[Citation.] ““Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ““the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citation.]” (*People v. Prieto* (2003) 30 Cal.4th 226, 260.) Absent an objection and request for an admonition to the jury, we review a contention of prosecutorial misconduct solely when ““an admonition would not have cured the harm caused by the misconduct.”” (*People v. Earp* (1999) 20 Cal.4th 826, 858.)

1. *Photograph*

Appellant contends the prosecutor advocated inconsistent positions with respect to a copy of a photograph taken by Wilkinson during her examination of Jessica. He argues that the prosecutor relied on a statutory presumption that the copy was accurate in order to introduce it as evidence (Evid. Code., § 1553), but repudiated the copy’s accuracy when defense expert Caruso testified that the photograph showed no injuries. Generally, a prosecutor’s bad faith pursuit of inconsistent positions at trial may constitute misconduct. (*People v. Wilson* (2005) 36 Cal.4th 309, 334.) As explained below, the prosecutor did not advance inconsistent positions regarding the copy of the photograph.

a. *Underlying Proceedings*

At trial, Wilkinson described her physical examination of Jessica, noting that she had taken photographs of Jessica during the examination. As Wilkinson testified, the photographs were projected on a courtroom screen. When Wilkinson explained her physical examination of Jessica’s vaginal opening, she stated that

she observed three injuries by moving Jessica's labia. Referring to a projected photograph of Jessica's genitals, Wilkinson testified that Jessica's injuries could be seen as three bright red areas; Wilkinson also noted that adjoining uninjured areas were a darker red. She circled the three areas on a copy of the projected photograph, which was admitted as exhibit 18.

Later, defense expert Caruso testified that she saw nothing abnormal or unusual within the circled areas on exhibit 18. During the prosecutor's cross-examination, Caruso acknowledged that her testimony relied solely on exhibit 18 and her experience, as she had neither examined Jessica nor read Wilkinson's examination report. When the prosecutor asked whether the quality of printer ink might affect exhibit 18, defense counsel raised no objection. Caruso answered that the digital master photograph from which exhibit 18 had been copied was likely to be accurate, and added that she had not seen the master photograph.

However, when the prosecutor asked Caruso whether lighting conditions may affect a photograph, defense counsel objected that the question was inconsistent with the prosecutor's position that exhibit 18 was admissible as a "fair and accurate representation." In addition, defense counsel asked the court to instruct the jury that exhibit 18 had been "admitted and received as a fair and accurate representation of what's depicted." The trial court did not admonish the jury, but barred the prosecutor from questioning Caruso regarding how accurately exhibit 18 represented Jessica's genital area. After the prosecutor resumed her examination, Caruso stated that it would be beneficial to see the patient and view more than one photograph, but nonetheless maintained that exhibit 18 showed no injuries.

Shortly afterward, when the prosecutor sought to question Caruso regarding the master photograph underlying exhibit 18, defense counsel again objected that the prosecutor was challenging whether exhibit 18 was a "fair and accurate

representation.” Over the objection, the trial court permitted the prosecutor to display the master photograph on the courtroom screen. Upon viewing the projected photograph, Caruso acknowledged that Jessica’s genitals displayed “uneven redness,” but denied that she saw injuries.

Later, when the prosecutor asked rebuttal witness Stotts whether one can distinguish normal genital redness from bruising by viewing a single photograph, defense counsel renewed his contention of prosecutorial misconduct. Defense counsel argued that it was improper for the prosecutor to assert that “a photograph is as it purports to be as a necessary foundation for . . . admitting [the] photograph, and then turn and say that [the] photograph is not what it purports to be.” In rejecting the contention, the trial court concluded that the prosecutor, in eliciting Willkinson’s testimony regarding the injuries she observed during her examination of Jessica, offered exhibit 18 merely as a “memorializ[ation]” of Wilkinson’s examination, and that Willkinson effectively testified only that upon viewing exhibit 18, she saw a “little bit of the reddening” in the injured areas, which she circled for the jury.

b. *Analysis*

We agree the prosecutor engaged in no misconduct. In offering exhibit 18 into evidence, the prosecutor relied on a statutory presumption that a printed copy of a digitally stored image is “an accurate representation of the image[] it purports to represent” (Evid. Code, § 1553) for purposes of satisfying the so-called “[s]econdary [e]vidence [r]ule” (Evid. Code, §§ 1520-1523). However, as explained below, the fact that a photograph satisfies such foundational requirements for its admission does not also establish that the photograph constitutes an adequate basis for an expert’s opinion. For this reason, the prosecutor did not take inconsistent positions in relying on the statutory

presumption while challenging Caruso's expert testimony.

A photograph, like other writings, must be authenticated before it is admitted into evidence. (*People v. Jones* (1970) 7 Cal.App.3d 48, 52-53.) "Authentication of a writing" is defined as "(a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.) Furthermore, a writing must be authenticated before its content may be received under the secondary evidence rule (Evid. Code, § 1401, subd. (b),) which requires proof of "[t]he content of [the] writing" by an original or "admissible secondary evidence (Evid. Code, §§ 1520, 1521, subd. (a)). As noted above, the provisions of the secondary evidence rule incorporate a presumption regarding the accuracy of copies of digitally stored images (Evid. Code, § 1553).

These foundational requirements can be satisfied for a copy of a writing through the introduction of evidence sufficient to sustain findings (1) that "the writing and copy are what the proponent of the evidence claims them to be" and (2) that the copy accurately reflects the original. (See *People v. Garcia* (1988) 201 Cal.App.3d 324, 328-329.) After an adequate foundational showing has been made, conflicts regarding the copy's precise degree of accuracy go to its weight as evidence, rather than its admissibility. (*Id.* at p. 329.) Here, Wilkinson's testimony that she took the master photograph underlying exhibit 18, coupled with the statutory presumption described above, provided an adequate foundation for the admission of exhibit 18. (See *ibid.*)

Nonetheless, the satisfaction of these foundational requirements did not, by itself, establish that exhibit 18 was sufficiently accurate and informative to disclose whether Jessica had suffered injuries. Generally, a photograph can satisfy the foundational requirements for its admission without necessarily providing an adequate basis for expert opinions regarding the subject depicted in the

photograph. (See *Smith v. ACandS, Inc.* (1994) 31 Cal.App.4th 77, 92, disapproved on another ground in *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1245 [adequately authenticated photographs of factory were inadequate basis for expert's opinion regarding asbestos dust levels at factory]; see *Stephen v. Ford Motor Co.* (2005) 134 Cal.App.4th 1363, 1370-1373 [trial court properly excluded expert's opinion regarding tire defects based primarily on expert's viewing of amateur photographs of the pertinent tires].) Furthermore, even when an expert's opinion is properly based on a photograph, the expert may be examined regarding whether the photograph adequately supports the opinion. (*Poggetto v. Owen* (1960) 187 Cal.App.2d 128, 137-138.)

In view of these principles, the prosecutor did not advocate inconsistent views concerning the accuracy of exhibit 18 by examining Caruso on whether the exhibit, viewed in isolation, was capable of disclosing the existence of Jessica's injuries. Caruso's testimony that she saw no injuries depicted on exhibit 18 raised the inference that Jessica was not, in fact, injured. The prosecutor could properly challenge this inference without undermining the foundation for the admission of exhibit 18. As the trial court noted, the prosecutor offered the exhibit as a memorialization of the examination by Wilkinson, who testified that one could see three areas of redness where Wilkinson had observed injuries while physically examining Jessica. The exhibit could display the accuracy needed for its admission for such purposes without being sufficiently informative *in itself* to establish whether Jessica had suffered injuries. For this reason, the prosecutor did not engage in misconduct with respect to exhibit 18.

2. *Questions Regarding DNA Samples*

Appellant contends the prosecutor engaged in misconduct by asking improper questions after the trial court sustained objections to the prosecutor's line

of questioning. Generally, it is misconduct for a prosecutor to violate a court ruling by eliciting or attempting “to elicit inadmissible evidence in violation of a court ruling.” (*People v. Silva* (2001) 25 Cal.4th 345, 373.) As explained below, appellant has established no misconduct.

a. *Underlying Proceedings*

During the examination of Stacy Vanderschaaf, the prosecution’s DNA screening analyst, the prosecutor elicited that extra samples of DNA traces found on Jessica had been preserved for appellant if he wished to engage in independent DNA testing. The following exchanges then occurred:

“[Prosecutor]: And in this case, was there ever a request from the defense?

“[Defense Counsel]: Objection. . . .[¶]

“[Prosecutor]: I’m sorry, what was the objection?

“[The Court]: Just sustained it. If you want to hear, we’ll do sidebar. You can follow it up at a later time.

“[Prosecutor]: Now, you are the only person . . . [who] would keep this evidence or split it if there was ever a split needed; is that correct?

“[Defense Counsel]: Objection; speculation.

“[The Court]: Can you rephrase that[?] . . . [¶] . . . [¶]

“[Prosecutor]: If a request came from -- for a split of the evidence . . .

“[The Court]: Same objection. Same ruling. I’ll explain it. Let’s do it sidebar.”

During the sidebar conference, the prosecutor stated, “I didn’t hear the objection. I didn’t even hear what it was.” The trial court explained that it had sustained objections to the prosecutor’s questions because they “shift[ed] the

burden.”⁴ Although defense counsel informed the court that his objections had been predicated on prosecutorial misconduct, he requested no admonishment.

Later, during the prosecutor’s redirect examination of Penny Reid, the prosecution’s forensic DNA analyst, the prosecutor asked whether that the DNA samples taken from the area of Jessica’s breasts had been preserved from contamination. After Reid answered in the affirmative, the following colloquy occurred:

“[Prosecutor]: Did you leave a sample to do a split if somebody –

“[The Court]: Same objection. Same ruling the court had. Don’t go in there.

“[Prosecutor]: Was there a sample available to be tested?

“[Defense Counsel]: Same objection.

“[The Court]: Same objection, same ruling.

“[Prosecutor]: Nothing further.”

b. *Analysis*

Appellant maintains the prosecutor improperly “persisted in asking virtually the same question” despite the trial court’s rulings that the questioning was improper. However, as the record discloses no request for an admonition in connection with the objections to the prosecutor’s questions, appellant has forfeited his contention. (*People v. Montiel* (1993) 5 Cal.4th 877, 914; *People v. Pitts* (1990) 223 Cal.App.3d 606, 691- 692.) Nonetheless, we would reject the contention were we to address it on the merits.

⁴ In addition, the trial court suggested that “splits” are confidential under Evidence Code section 730.

We find dispositive guidance regarding the contention from *People v. Bennett* (2009) 45 Cal.4th 577 (*Bennett*). There, the prosecutor asked a prosecution DNA expert whether the defendant had requested a split from a DNA sample to conduct his own testing. (*Id.* at pp. 592-593.) The trial court initially barred the question on the grounds that the risk of prejudice outweighed the probative value of the answer (Evid. Code, § 352), and rejected a mistrial motion based on a contention of prosecutorial misconduct, namely, that the prosecutor's question improperly attempted to shift the burden of providing evidence to the defendant. (*Bennett, supra*, at p. 593.) However, when the prosecutor inquired of a second prosecution DNA expert whether additional samples existed for further testing, the trial court ruled that the question impermissibly implied that the defendant should have retested the samples. (*Id.* at pp. 593-594.) Later, after the prosecutor asked a defense expert whether retesting was a wrongly accused person's best insurance against a false accusation, the trial court sustained a defense objection to the question. (*Ibid.*)

Before the Supreme Court, the defendant maintained that the prosecutor's questions shifted the burden of proof to the defendant, and constituted misconduct in view of the trial court's rulings. (*Bennett, supra*, 45 Cal.4th at pp. 595-596.) The court held that the questions did not attempt to shift the burden of proof because they did not suggest or imply that the defendant had a duty to present evidence. (*Id.* at p. 596.) The court also found no prosecutorial misconduct, as the record showed that the prosecutor had tried to follow rulings that were somewhat unclear. (*Ibid.*)

We reach the same conclusions here. The prosecutor's questions regarding the existence of DNA samples for retesting and appellant's requests for such

samples were not improper attempts to shift the burden of proof, as they did not imply that appellant had a duty to present evidence.⁵ Furthermore, the record demonstrates that the prosecutor attempted to follow the trial court's rulings. After the court sustained objections to the prosecutor's questions to Vanderschaaf regarding whether appellant had requested samples for testing, the prosecutor limited her question to Reid to whether samples existed for independent testing. As the scope of the trial court's ruling concerning the questions to Vanderschaaf was unclear, we discern no misconduct in connection with the question to Reid.

3. *Closing Argument*

Appellant contends the prosecutor engaged in two instances of misconduct in the course of her closing argument. As explained below, he has shown no misconduct.

a. *Underlying Proceedings*

At the beginning of the rebuttal portion of the prosecutor's closing argument, she stated: "Ladies and gentlemen, I want to talk about what this case is not about. . . . It's not about whether or not you like the defendant. [¶] I mean there's plenty that you've heard to not like him, the laughing at Jessica because she worked at Shakey's Pizza or the way that he toyed with her sister and her mother. Why would you answer the phone and laugh and cause such torture and trauma to a family member who's trying to figure out what happened to their family member? He could have just not answered the phone. But the sadistic, callous

⁵ We note that the rulings cannot be affirmed on the other basis mentioned by the trial court (see fn. 4, *ante*), namely, Evidence Code section 730. This provision merely authorizes the trial court to appoint experts when necessary for trial, and makes no reference to the admissibility of evidence regarding DNA samples.

person in him decided that he was going to have some fun and laugh at these people who just wanted to know if their daughter or sister is alive. [¶] But it's not about that. It's about what he did to Jessica. It's not about sympathy. . . . I believe he's had family in here and maybe a child. It's not about feeling sympathetic towards him. We can appreciate, even though he can't appreciate somebody else's love for their child, even though he can't value that love and respect[,] that love of a family -- ”

At this point, defense counsel objected on the grounds of “improper argument.” After the trial court directed the prosecutor to “stay within the facts of the case . . . [a]nd as the evidence shows,” the prosecutor continued: “Even though he can laugh in someone's face when they are looking for their family member, we can understand that he has a family that he loves, but you are not to use that when you go back into the jury room. Not to talk about that.”

Later, the prosecutor stated that during a jury trial, the defendant has two basic defenses, namely, to deny the existence of the crime or his role as the perpetrator. The prosecutor then argued: “And in this case, the defendant is backed up against the wall. It can't be not me. Why? We've got DNA [evidence]. Jessica i.d.'s him a month later We've got the telephone call. Then, you know, he admits. So as a defense, what are you going to do? You can't go with i.d. He admits to 90 percent of what Jessica says happened. So what's the defense supposed to do? They're not going to wave the white flag, say you got us, guilty. He says he's not guilty. He has a right to a trial. And he's getting his trial. He's got two interpreters. Two attorneys.”

At this point, defense counsel objected on the grounds of “improper argument.” The trial court sustained the objection insofar as the prosecutor had referred to appellant's attorneys, but otherwise denied the objection. The prosecutor then stated: “[The b]ottom line is [that appellant] has his right to a trial

and he has a right to a defense. He can't say it's not me. So the only option is damage control minimized. That's the only option. It's called losing the battles to win the war. So that's what we have here."

b. *Analysis*

Appellant contends the two portions of the prosecutor's argument to which his counsel objected constitute misconduct. Because no admonition was requested in connection with the objections, he has forfeited his contentions. However, we would conclude the contentions fail if we were to address them on the merits.

Appellant maintains the initial portion of the prosecutor's argument constituted an improper attempt to arouse the passions of the jury. "To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." (*People v. Frye* (1998) 18 Cal.4th 894, 970, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Under this standard, we discern no misconduct.

Generally, "a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] . . .' [Citation.] 'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness'" [citation], and he may "use appropriate epithets" [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819, quoting *People v. Williams* (1997) 16 Cal.4th 153, 221; see *People v. Pitts*, *supra*, 223 Cal.App.3d at p. 701 [reference to defendant's crimes as atrocities did not constitute misconduct].) Nonetheless, "an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of trial; an appeal for sympathy for the victim is out of place during an objective determination of

guilt.” (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057.)

Here, the prosecutor argued that the issue was not whether jurors liked or disliked appellant or felt sympathy for him and his family, but “what he did to Jessica. It’s not about sympathy.” Even if such comments could be construed to highlight appellant’s callous treatment of Jessica’s family through the rhetorical device of paraleipsis, the prosecutor’s reference to admissible evidence cannot reasonably be regarded as a subterfuge to inflame the passions of the jury with irrelevant or improper considerations. (Cf. *People v. Wrest* (1992) 3 Cal.4th 1088, 1106-1107 [prosecutor’s use of paraleipsis to suggest capital punishment warranted by biblical scripture and general deterrence improper].)

Appellant contends the second portion of the prosecutor’s argument was intended to arouse the passions of the jury by disparaging his rights to a trial and counsel. We disagree. The record discloses only that the prosecutor, in discussing appellant’s defense strategy, expressly and repeatedly affirmed appellant’s right to a trial. Nor did the prosecutor’s brief reference to appellant’s two defense attorneys constitute misconduct, as the prosecutor never suggested they had acted improperly in presenting appellant’s defense. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1167 [improper comment on defense counsel ordinarily involves a “personal attack”].) In sum, appellant has failed to establish prosecutorial misconduct.

B. Sentencing

Appellant challenges his sentence on several grounds. As explained below, we conclude the trial court erred in imposing sentence.

In sentencing appellant, the trial court identified appellant’s conviction for forcible rape (§ 261, subd. (a)(2)) under count 4 as the principal term, and imposed the high term of eight years. In addition, the court imposed a 25-years-to-life “enhancement” on count 4 under the One Strike law (§ 667.61), as well as a three-

year enhancement for use of a deadly weapon (§ 12022, subd. (b)(2)). The court imposed consecutive high term sentences of eight years on each of appellant's remaining convictions for sexual offenses (sexual penetration by a foreign object (§ 289, subd. (a)(1); counts 3, 6, and 8), forcible rape (§ 261, subd. (a)(2); count 5), and forcible oral copulation (288a, subd. (c)(2); count 7), with the exception of his conviction under count 11 for attempted sodomy, on which it imposed a three-year term. Regarding appellant's other convictions, the court imposed a consecutive one-year term for robbery (§ 211; count 2), and a consecutive life term for kidnapping during a carjacking (§ 209.5, subd. (a); count 1).

1. *Governing Principles*

Appellant was convicted of offenses under the One Strike law (§ 667.61), which authorizes the imposition of indeterminate terms; additionally he was convicted of other offenses punishable by determinate terms. Generally, indeterminate term crimes and determinate term crimes are subject to different sentencing schemes. (*People v. Neely* (2009) 176 Cal.App.4th 787, 797.) "Such sentencing has been conceptualized as sentencing in separate boxes." (*Id.* at p. 798.) The trial court separately determines the sentences to be imposed for each category of crime, and then "combines the two to reach an aggregate total sentence. Nothing in the sentencing for the determinate term crimes is affected by the sentence for the indeterminate term crime[s]." (*Ibid.*) When the defendant is sentenced to determinate and indeterminate terms, the determinate term is served first. (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1094.)

Here, appellant's convictions for sexual penetration by a foreign object (§ 289, subd. (a)(1); counts 3, 6, and 8), forcible rape (§ 261, subd. (a)(2); counts 4 and 5), and forcible oral copulation (§ 288a, subd. (c)(2); count 7) are potentially subject to indeterminate terms under the One Strike law, which "sets forth an

alternative and harsher sentencing scheme for certain enumerated sex crimes perpetrated by force, including rape, foreign object penetration, sodomy, and oral copulation.” (*People v. Mancebo* (2002) 27 Cal.4th 735, 741, fn. omitted, (*Mancebo*)).) The version of the One Strike law applicable in 2009, when appellant committed the offenses, authorized the imposition of a 25-years-to-life sentence for the crimes under subdivision (a) of the statute, provided either (1) that one or more circumstances described in subdivision (d) were established, or (2) that two or more circumstances described in subdivision (e) were established. (Former § 667.61, subds. (a), (c) (d), (e), (f).) In connection with the counts described above, the jury found only two circumstances under subdivision (e) of the statute, namely, that appellant had engaged in kidnapping (§ 207) or kidnapping during a carjacking (§ 209.5), and that appellant had personally used a dangerous or deadly weapon.

To the extent appellant’s remaining offenses are subject to determinate terms, section 1170.1 establishes the “sentencing protocol” for offenses with determinate terms (*People v. Neely, supra*, 176 Cal.App.4th at p. 797), unless the offenses fall under the special sentencing scheme for enumerated sex crimes in section 667.6 (*id.* at p. 799, fn. 7; *People v. Pelayo* (1999) 69 Cal.App.4th 115, 123). Sentencing pursuant to section 1170.1 involves a three-step procedure. (*People v. Neely, supra*, at pp. 797-798.) “First, the trial court is required to select a base term -- either the statutory low, middle or upper term -- for each of the crimes. [Citations.] Second, if the court determines that a consecutive sentence is merited, it must designate the crime with the ‘greatest’ selected base term as the principal term and the other crimes as subordinate terms. [Citation.] Third, the court sentences the defendant to the full base term it selected for the principal term crime and one-third of the middle term for any crimes for which the sentence is ordered to run consecutively. [Citations.] A subordinate term is one-third of the

middle term even if the trial court had initially selected the lower or upper term as the base term.” (*Id.* at p. 798, italics deleted.)

Sex crimes are treated differently. (*People v. Pelayo, supra*, 69 Cal.App.4th at p. 123.) In 1979, the Legislature enacted section 667.6 to increase prison terms for a group of violent sex crimes, which include sexual penetration by a foreign object (§ 289, subd. (a), forcible rape (§ 261, subds. (a)(2) - (a)(7), and forcible oral copulation (§ 288a, subds. (c)(2) - (c)(3)). (*People v. Pelayo, supra*, at p. 123.) Section 667.6 permits the imposition of “a full, separate, and consecutive term” for these offenses. (§ 667.6, subds. (c), (d), (e).)

2. *One Strike Sentencing*

At the outset, we observe that our independent review of the record disclosed a sentencing error not raised by the parties in their original briefs. Notwithstanding the parties’ failure to address the issue, “[w]e may set aside an unauthorized sentence so a proper sentence may be imposed, even if the new sentence is harsher.” (*People v. Delgado* (2010) 181 Cal.App.4th 839, 854.) As explained below, in sentencing appellant, the trial court incorrectly relied on a former provision of the One Strike law not contained in the One Strike law applicable to appellant’s crimes.⁶

Before September 2006, the One Strike law contained former subdivision (g), which stated that a One Strike sentence “shall be imposed on the defendant *once* for any offense or offenses committed *against a single victim during a single occasion*.”” If there are multiple victims during a single occasion, the term

⁶ At our request, the parties have submitted supplemental briefs on this issue.

specified in subdivision (a) or (b) shall be imposed on the defendant once for each separate victim. “*Terms for other offenses committed during a single occasion shall be imposed* as authorized under any other law, including Section 667.6, if applicable.” (Italics added.) In *People v. Jones* (2001) 25 Cal.4th 98, 100, 103, 107 (*Jones*), our Supreme Court concluded that the Legislature, in enacting former subdivision (g), “intended to impose no more than one [One Strike] sentence per victim per episode of sexually assaultive behavior.”

In determining appellant’s sentence, the court relied on former subdivision (g). Following a discussion of *Jones* and other case authority regarding former subdivision (g), the court found that all of the sex offenses were committed against a single victim on a single occasion, relying on the factors for determining whether crimes occurred on a single occasion, as identified in section 667.6, subdivision (d). The court then imposed a 25-years-to-life “enhancement” on one of appellant’s offenses subject to the One Strike law, and consecutive high term sentences on his remaining sex offenses, with the exception of his conviction for attempted sodomy.

However, in September 2006, prior to appellant’s offenses in 2009, the Legislature amended the One Strike law to eliminate former subdivision (g) (Stats. 2006, ch. 337, § 33, pp. 2165-2167), and the version of the One Strike law applicable to appellant’s offenses does not contain it. The sole provision relevant to the sentencing of multiple offenses under the applicable One Strike law is subdivision (i), which states that “the court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in

subdivision (d) of Section 667.6.”⁷

As no published decision has examined the import of the amendment that eliminated former subdivision (g) from the One Strike law, we confront a question of statutory interpretation. ““In construing a statute, our task is to determine the Legislature’s intent and purpose for the enactment. [Citation.] We look first to the plain meaning of the statutory language, giving the words their usual and ordinary meaning. [Citation.] If there is no ambiguity in the statutory language, its plain meaning controls; we presume the Legislature meant what it said. [Citation.]”” (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1149.) In addition, we may examine the statute’s legislative history. (*Ibid.*) Here, subdivision (a) of the applicable version of the One Strike law states that “[a]ny person who is convicted of an [enumerated] offense [enumerated in the One Strike law]. . . under two or more of the circumstances specified in subdivision (e) *shall* be punished by imprisonment in the state prison for 25 years to life.” (Italics added.) Because this provision attaches One Strike sentences to individual offenses, it establishes that such a sentence must be imposed on each offense.

Our conclusion finds additional support from the Legislature’s amendments to the statute. Generally, “when . . . the Legislature undertakes to amend a statute which has been the subject of judicial construction[,] . . . , and . . . substantial changes are made in the statutory language[,] it is usually inferred that the lawmakers intended to alter the law in those particulars affected by such changes.” (*Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal.3d 650, 659.) As the Legislature eliminated subdivision (g), which the courts had interpreted to limit the number of One Strike sentences properly

⁷ This portion of subdivision (i) is found in the version of the One Strike law applicable to appellant’s offenses and the current version of the law.

imposed on multiple offenses against a single victim on a single occasion, we infer that the Legislature intended to abrogate this restriction.

Because the applicable version of the One Strike law mandated the imposition of a 25-years-to-life sentence on each of appellant's eligible offenses, the matter must be reversed for resentencing. In view of the trial court's finding that all of appellant's sex offenses occurred on a single occasion against a single victim, the court has the discretion to impose consecutive or concurrent One Strike sentences on the eligible offenses. (*People v. Valdez* (2011) 193 Cal.App.4th 1515, 1524 [subdivision (i) of section 667.61 does not limit court's discretion to impose consecutive or concurrent One Strike terms on One Strike offenses falling outside subdivision (i)].) For the guidance of the court upon remand, we address appellant's contentions of error below.

3. *One Strike "Enhancement"*

Appellant contends the trial court erred in imposing the One Strike sentence on count 4 as an enhancement on an eight-year high term, rather than as the principal term. We agree, as does respondent. Because the One Strike law constitutes a separate sentencing scheme for offenses within its scope, punishment for such offenses is not subject to other sentencing schemes, except where the One Strike law so provides. (See *People v. Fuller* (2006) 135 Cal.App.4th 1336, 1342-1343.)

4. *Enhancement for Personal Use of a Deadly Weapon*

Appellant contends the trial court erred in imposing a three-year enhancement for personal use of a deadly or dangerous weapon (§ 12022, subd. (b)) on count 4. Respondent concedes he is correct. As noted above (see pt. B.1. & B.2., *ante*), the court was authorized to impose a 25-years-to-life on count 4 under

subdivision (a) of the applicable One Strike law if at least two special circumstances enumerated in subdivision (e) of the statute were established. Here, the jury found two such circumstances, but one was appellant's personal use of a knife. As we explain, in such cases, the applicable One Strike law precludes the use of the circumstance to impose additional punishment.

Subdivision (f) of the applicable One Strike law provides: "If only the minimum number of circumstances specified in subdivision (d) or (e) that are required for the punishment provided in subdivision (a) . . . to apply have been pled and proved, that circumstance or those circumstances shall be used as the basis for imposing the term provided in subdivision (a) . . . , *rather than being used to impose the punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or the punishment under another provision of law can be imposed in addition to the punishment provided by this section.* However, if any additional circumstance or circumstances specified in subdivision (d) or (e) have been pled and proved, the minimum number of circumstances shall be used as the basis for imposing the term provided in subdivision (a), . . . and any other additional circumstance or circumstances shall be used to impose any punishment or enhancement authorized under any other provision of law." (Italics added.)

As explained in *Mancebo*, subdivision (f) of the applicable One Strike law bars the use of special circumstances to impose additional punishment when, as here, only the minimal number of circumstances has been pleaded and established for purposes of sentencing under the One Strike law. (*Mancebo, supra*, 27 Cal.4th at p. 754.) There, the information charged the defendant with 10 offenses arising from sexual assaults on two victims. (*Id.* at pp. 739-741.) In connection with five counts, the information asserted only two allegations under subdivision (e) of the One Strike law: a gun use allegation and a kidnapping allegation. (*Mancebo*,

supra, at p. 740.) The jury found the defendant guilty as charged and found the special allegations to be true. (*Ibid.*) In sentencing the defendant, the trial court imposed gun use enhancements under a different statute, and also imposed sentences under the One Strike law, relying on the kidnapping allegation and the fact that there had been multiple victims. (*Mancebo*, at p. 740.) Our Supreme Court held this was error, as the information contained no multiple victim allegation under subdivision (e) of the One Strike law. (*Mancebo*, at pp. 742-754.) The court thus struck the gun use enhancements because they had been imposed in contravention of subdivision (f) of the One Strike law. (*Mancebo*, at p. 754.) In view of *Mancebo*, the trial court erred in imposing the three-year enhancement on count 4.

5. *Life Sentence for Kidnapping During A Carjacking (Count1)*

In a related contention, appellant maintains the trial court erred in imposing a life term under count 1 for kidnapping during a carjacking (§ 209.5), as appellant's One Strike sentence on count 4 effectively relied on this offense. As explained below, we agree.

For purposes of imposing a 25-years-to-life sentence on an offense under subdivision (a) of the applicable One Strike law, subdivision (e)(1) provides that a special circumstance is established when “the defendant kidnapped the victim of the present offense in violation of Sections 207 [simple kidnapping], 209 [kidnapping to commit robbery], or 209.5 [kidnapping during a carjacking].” In connection with appellant's sex crimes (counts 3-8, 11), the jury found that appellant had “kidnapped the victim of the present offense in violation of . . . section 207 or 209.5.” Because this finding necessarily encompassed appellant's conviction under count 1, subdivision (f) of the applicable One Strike law barred the imposition of separate punishment on count 1, as section 209.5 neither imposes

greater punishment than the One Strike law nor provides for additional punishment.

Pointing to *People v. Byrd* (2011) 194 Cal.App.4th 88 (*Byrd*), respondent maintains that punishment was properly imposed under count 1 because “[a]ppellant’s sentence under the One Strike law was premised on simple kidnapping for the commission of the sex offenses.” The crux of respondent’s argument is that the jury’s verdicts on the charges and special allegations against appellant necessarily implied that he had committed simple kidnapping, which constituted -- *by itself* -- the circumstance under subdivision (e)(1) of the One Strike law needed for the imposition of a One Strike sentence. We find no support in *Byrd* for this contention.

In *Byrd*, the defendant kidnapped two victims. (*Byrd, supra*, 194 Cal.App.4th at p. 92.) After releasing one of the victims, the defendant forced the other victim to drive him to a trailer, where he sodomized him. (*Id.* at p. 93.) Regarding the latter victim, the defendant was charged with simple kidnapping (§ 207) and forcible sodomy (§ 286, subd. (c)(2)), which falls within the One Strike law. (*Byrd, supra*, at p. 94.) To permit the imposition of a 25-years-to-life sentence for forcible sodomy under the One Strike law, the information alleged that appellant had engaged in aggravated kidnapping within the meaning of subdivision (d)(2) of the statute, which provides that a special circumstance is established when “[t]he defendant kidnapped the victim of the present offense and the movement of the victim substantially increased the risk of harm to the victim above that level of risk necessarily inherent in the underlying offense” (*Byrd*, at p. 100.) After the jury convicted the defendant on all counts and found the aggravated kidnapping special allegation to be true, the trial court imposed a 25-years-to-life One Strike sentence for forcible sodomy and also imposed additional punishment for simple kidnapping. (*Id.* at pp. 94-95.)

On appeal, the defendant maintained that subdivision (f) of the One Strike law barred additional punishment for simple kidnapping because aggravated kidnapping was the sole qualifying circumstance pleaded and proved at trial. (*Byrd, supra*, 194 Cal.App.4th at pp. 100-104.) The appellate court rejected this contention, concluding that simple kidnapping falls outside the special circumstance defined in subdivision (d)(2) of the statute. (*Byrd*, at pp. 101-102.) In so concluding, the court placed special emphasis on the absence of any reference to simple kidnapping in subdivision (d)(2), noting in contrast that subdivision (e)(1) specifically mentions simple kidnapping. (*Byrd*, at pp. 101-102.)

Here, unlike *Byrd*, the jury found as a special circumstance that appellant had “kidnapped the victim of the present offense in violation of . . . section 207 or 209.5” under subdivision (e)(1) of the applicable One Strike law.⁸ Because subdivision (e)(1) expressly places *both* simple kidnapping and kidnapping during a carjacking within the scope of the special circumstance it defines, neither offense can reasonably be regarded as independent of the special circumstance. For this reason, appellant’s offense of kidnapping during a carjacking necessarily fell within the special circumstance, as did his commission of simple kidnapping, which is implied by the former offense (see *People v. Russell* (1996) 45 Cal.App.4th 1083, 1088). Accordingly, the imposition of additional punishment under count 1 for kidnapping during a carjacking contravened subdivision (f) of the applicable One Strike law.

⁸ As respondent notes, the trial court, in sentencing appellant under the One Strike law, suggested that appellant had committed the kidnapping for the purpose of rape, even though the jury’s finding under subdivision (e) (1) of the One Strike law contained no reference to rape. In view of *Mancebo*, we limit our inquiry to the allegations that were “properly pled and proved.” (*Mancebo, supra*, 27 Cal.4th at p. 739.)

6. *Attempted Sodomy*

Appellant contends the trial court erred in imposing a consecutive term of three years under count 11 for attempted sodomy (§§ 286, subd. (c)(2), 664), which amounted to a full consecutive middle term for the offense. He argues the court was obliged to determine the sentence in accordance with the sentencing scheme found in section 1170.1.

We agree that upon remand, the sentence under count 11 must be calculated in accordance with section 1170.1, as attempted sodomy falls within neither the sentencing scheme in section 667.6 nor the One Strike law. It is well established that the offenses enumerated within section 667.6 do not include attempted sex crimes. (*People v. Le* (1984) 154 Cal.App.3d 1, 10-11, disapproved on another point in *People v. Piper* (1986) 42 Cal.3d 471, 477, fn. 5.) As the applicable One Strike law contains a similar enumeration of crimes, we conclude the One Strike law is also inapplicable to attempted sex crimes. Respondent acknowledges that the sentence for count 11 must be imposed in accordance with section 1170.1.

7. *Restitution and Parole Revocation Fines*

Appellant contends the trial court erred in imposing restitution fines and parole revocation fines. Absent special circumstances, the minimum restitution fine is \$200 (§ 1202.4, subd. (b)(1)); furthermore, parole revocation fines must be set “in the same amount” as restitution fines (§ 1202.45). In sentencing appellant, the trial court stated it was “imposing the mandatory minimum restitution fines as required by state law,” but ordered parole revocation fines “in the amount of \$300 per count.” Upon remand, the trial court shall have the opportunity to clarify its orders regarding the fines. (*People v. Waldie* (2009) 173 Cal.App.4th 358, 368.)

DISPOSITION

The judgment is reversed with respect to appellant's sentence, and the matter is remanded for re-sentencing in accordance with this opinion (see pt. B., *ante*).

The judgment is affirmed in all other respects.

CERTIFIED FOR PARTIAL PUBLICATION

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.